Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DOUGLAS NYHUIS

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

A. WAS PETITIONER SUBJECTED TO MULTIPLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE WHEN HE WAS PROSECUTED AND PUNISHED FOR THE VERY SAME CONDUCT WHICH, ALTHOUGH NOT CHARGED IN AN EARLIER PROSECUTION, HAD BEEN MADE THE SUBJECT OF AND ACCOUNTED FOR IN A PLEA AGREEMENT IN THAT EARLIER PROSECUTION AND USED TO INCREASE PETITIONER'S SENTENCE IN THE EARLIER PROSECUTION BY FOUR YEARS?

B. HAS PETITIONER BEEN PROSECUTED AND PUNISHED IN VIOLATION OF THE USE AND TRANSACTIONAL IMMUNITY GRANTED TO HIM BY THE GOVERNMENT IN THE EARLIER MICHIGAN PROSECUTION?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. UNITED STATES OF AMERICA
   (Plaintiff-Appellee in Lower Court Proceedings)

2. DOUGLAS NYHUIS
   (Defendant-Appellant in Lower Court Proceedings)

3. ANICIA MARIVEL RIPOLL, a/k/a ANICIA GOODMAN
   (Defendant-Appellant in Lower Court Proceedings)

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OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

On April 4, 1991, the United States District Court, Middle District of Florida, Hon. Patricia C. Fawsett, denied Petitioner's motions to dismiss the indictment based on grounds of double jeopardy and immunity in an unpublished Order and Opinion (65a).[1]

On December 2, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed the United States District Court's denial of the aforementioned motions and affirmed the Petitioner's conviction and sentence in a published Opinion, United States v Nyhuis, 8 F 3d 745 (11th Cir., 1993) (1a). On February 2, 1994, the Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc in an unpublished PER

[1] References are to pages of the Appendix which is filed or presented to the Court in a separate volume.

CURIAM Order. (63a).

STATEMENT OF JURISDICTION

Petitioner moves this Honorable Court now for a Writ of Certiorari and review of the aforementioned Judgment of the United States Court of Appeals for the Eleventh Circuit entered on December 2, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Malitia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

compensation.

United States Constitution, Amendment Five. (Emphasis added)

STATEMENT OF THE CASE

Approximately one year before the Petitioner, Douglas Nyhuis, was indicted in Florida in the instant case, he was indicted in a U.S. District Court in Michigan. Specifically, on December 14, 1989, Petitioner was indicted in the U.S. District Court for the Western District of Michigan on two counts of a 26-count indictment. He was charged with one count of Conspiracy to Distribute a Controlled Substance in violation of Title 21, United States Code, §§ 841 and 846. In Count 26, Petitioner was charged with a Continuing Criminal Enterprise (CCE) in violation of Title 21, United States Code, § 848. Overt acts with which Petitioner was charged in these counts consisted solely of Petitioner's involvement with marijuana

from the years 1985 through 1987.

On January 29, 1990, Petitioner, pursuant to a plea agreement signed by the parties on December 13, 1989, (88a) tendered a guilty plea before U.S. District Judge Richard A. Enslen to the count of CCE (Count 26). In exchange for Petitioner's plea and his cooperation with the DEA including providing information and testifying[2], the Government agreed to the following:

> 4. The United States Attorneys Office agrees:
>
> (a) To make a binding sentence recommendation that the sentence to be imposed by the Court be one of ten years (the statutory minimum). This will be a binding recommendation

[2] In fact, in keeping with the December 13, 1989, plea agreement, Petitioner testified before a Michigan grand jury on December 14, 1989, to further the government's investigation of related crimes. (See transcript of January 24, 1991, evidentiary hearing held before Florida District Court Judge P.C. Fawsett, p. 20)

> pursuant to Federal Rule of Criminal Procedure 11(a)(1)(C); and
>
> * * * *
>
> (c) The Government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the Government.
>
> (d) To dismiss Count I of the Information at the time of sentence.

(91a and 92a) At the January 29, 1990, proceedings held before Judge Enslen, the Court stated that

> Paragraph (c) is a very important agreement as far as you are concerned, and may be -- the Government agrees not to bring any additional criminal charges against you involving the distribution of marijuana, and in the Western District of Michigan.[3]

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[3] Transcript of January 29, 1990, Plea Proceeding in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR.

The Court indicated it would accept or reject the plea and plea agreement only after it had an opportunity to review Petitioner's presentence.

On May 24, 1990, the Government filed a sentencing memorandum in which it informed the Court that Petitioner had neglected to inform the Government of his involvement in cocaine distribution in 1986 and neglected to tell that he was also instrumental in 1989 in introducing persons to one George Marian for the purpose of facilitating marijuana and cocaine dealing. On May 25, 1990, the parties entered into a written stipulation to the plea agreement which had been entered into on December 13, 1989, and placed on the record on January 29, 1990. Specifically, paragraph 4(a) was amended to reflect that the Government was making a binding recommendation that Petitioner's sentence not exceed 15 years. (91a) Also on May 25, 1990, the parties appeared

before the Court to confirm the amendment to the plea agreement. Judge Enslen then inquired as to whether the presentence report contained information regarding Petitioner's cocaine involvement, and, upon hearing that such information was not in the report, the Court again declined to accept or reject the plea and plea agreement. Counsel for Petitioner then expressed concern over the Court's decision to defer its decision on the plea, indicating that without the Court's acceptance of the plea agreement and tendered plea, Petitioner might, upon testifying pursuant to the plea agreement, be subject to additional prosecution.[4] In response, the Government replied that

> [A]s far as the agreement, the Defendant's agreement, if the Court accepts the ultimate agreement of

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[4] Transcript of May 25, 1990, Plea Proceeding in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR, pp. 16-18.

> the parties, the Defendant is fully protected.[5]

The Court then again indicated its desire to review Petitioner's presentence report, including information regarding a statement Petitioner had made to the authorities in April of 1990 pursuant to his plea agreement, and adjourned the proceedings.

A June 6, 1990, U.S. Probation Department memorandum made reference to an April 6, 1990, debriefing by Petitioner at which time Petitioner allegedly indicated that he did not previously disclose his cocaine involvement because he had been indicted on charges of marijuana distribution only. Petitioner then disclosed that he received approximately 4 kilograms of cocaine from George Marian in September of 1986, received 4 kilograms of cocaine from November of 1987 to February of 1988, and that in mid-1989 he placed

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[5] Id., p. 19.

Mark DeVries in contact with George Marian facilitating another cocaine transaction. Additionally, he arranged for another individual to obtain a kilogram of cocaine from George Marian in Florida.

In a July 10, 1990, Government sentencing memorandum, the Government informed the Court that the Government had gained additional information from Petitioner as well as from other cooperating individuals regarding Petitioner's cocaine involvement. This information included the following: (1) in February of 1989, Petitioner sent a Grand Rapids man to Florida to secure one kilogram of cocaine from a Florida resident; and (2) subsequent to February of 1989, Petitioner arranged for Mark DeVries to purchase a kilogram of cocaine from the Florida source and provided a beeper number to Mark DeVries to facilitate purchase of a second kilogram. The Government

concluded that Petitioner was responsible for the purchase and distribution of six to nine kilograms of cocaine from 1986 through 1989. (100a and 101a) The Government then recommended that the Court accept the amended plea agreement, stating its belief that Petitioner had "complied with his promise to cooperate with the Government on this investigation and others," and that Petitioner's

> testimony was crucial to securing the conviction of six co-defendants at trial recently and his publicized willingness to cooperate with authorities was a motivating factor in securing other guilty pleas from co-defendants.

(104a) The Government recommended finally that the Court impose the maximum sentence of 15 years incarceration. (105a)

At Petitioner's July 16, 1990, sentencing, the Court inquired of the Government why, if Petitioner's testimony was responsible for the conviction of many co-defendants, the Government continued to

recommend the maximum sentence. U.S. Attorney Mark Courtade replied

> Because, Your Honor, as we stated within our sentencing memorandum, his involvement was still extensive. His involvement was with many tons of marijuana and with cocaine.
>
> Quite frankly, the Defendant is going to continue to cooperate. It is not part of his plea agreement. But should he continue to cooperate with the government in its investigation here and in Florida, it is our intention to join with him in seeking a reduced sentence should that be warranted.
>
> * * * *
>
> ....We negotiated an agreement which called for the minimum sentence of ten years. We did that without full knowledge of other involvement of Doug Nyhuis. We believe that because of that other involvement it would warrant an additional sentence.
>
> We negotiated again in good faith with defense counsel, and their agreement was 15 years, which we would believe would have been covered by the involvement with cocaine, if we divorced all of the marijuana from the case, or it would have been an agreement that should he have lied -- and I stress to the Court that he did not lie to the grand jury about his involvement in cocaine; there was no lying that

> took place. Should he have, we believe that that would have warranted five years in and of itself.
>
> So we agreed, we -- it was part of our negotiation strategy -- and we arranged that his sentence reflect not only his involvement with cocaine, but should he have been asked those questions, it was an understanding that he could have faced five more years, and you would have given him five more years, or at least five.
>
> So it was kind of comb-, of the adding of the potential criminality should he have lied -- which he did not do -- and his involvement with cocaine divorced from the marijuana, we just figured they were both worth five years, and that is what we sought.... (Emphasis added)[6]

The Court then stated that after hearing the trial of the co-defendants in Petitioner's case it had learned much about the facts underlying the indictments and conviction, and that it was in the interest of justice to accept the amended plea

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[6] Transcript of July 16, 1990, Sentencing in U.S.A. v Douglas Nyhuis, U.S. Dist. Court, W. District of Mich., Case No. G89-178-01 CR, pp. 7-9.

agreement.[7]

The Court sentenced Petitioner to 14 years imprisonment, $150,000.00 fine, and a $50.00 assessment. It is clear from the statements made by the sentencing court just prior to imposing sentence that the Court considered, in fashioning a sentence, Petitioner's involvement in both marijuana and cocaine.[8] Additionally, the Eleventh Circuit observed in its decision in this case that the "Government does not dispute that the Michigan District Court considered Nyhuis' cocaine activities in sentencing him on the CCE conviction...." (8 F 3rd at p. 740) and in her April 4, 1991, Order and Opinion denying Petitioner's Motion to Dismiss, Florida District Court Judge Fawsett found that the Michigan District Court considered Petitioner's cocaine

[7] Id., p. 11.

[8] Id., pp. 24, 29-30.

involvement and that Petitioner's Michigan sentence included a separate punishment for his cocaine involvement. (72a through 74a)

Pursuant to his amended plea agreement, Petitioner testified on July 18, 1990, before a Michigan grand jury, answering questions posed to him by U.S. Attorney Mark Courtade regarding Petitioner's involvement with one George Marian in the purchasing and distribution of marijuana and cocaine.

On October 10, 1990, Petitioner was indicted in the instant case in the U.S. District Court for the Middle District of Florida and charged in Count II of that indictment with Conspiracy to Distribute in excess of five kilograms of cocaine in violation of Title 21, United States Code, §§ 846 and 841(b)(1)(A)(ii). Overt acts with which Petitioner was charged in Count II consisted of the following:

55. In or around March, 1989, the exact date being unknown to the Grand Jury, the Defendant DOUGLAS NYHUIS, contacted CI [cooperating individual] #20 in Grand Rapids, Michigan, and requested that he/she go to Miami and obtain one kilogram of cocaine from Defendant GEORGE NICHOLAS MARIAN. CI #20 drove to Miami, Florida, and talked to CI #1 on the telephone. CI #20 met with Defendant GEORGE NICHOLAS MARIAN and obtained one kilogram of cocaine. CI #20 drove the kilogram of cocaine to Defendant DOUGLAS NYHUIS in Grand Rapids, Michigan. CI #20 received one ounce of cocaine for his/her services. One week later, CI #20 received approximately 12 ounces of cocaine to sell from Defendant DOUGLAS NYHUIS.

58. In or around July or August, 1989, the exact date being unknown to the Grand Jury, CI #21 visited Defendant DOUGLAS NYHUIS who provided him/her with Defendant GEORGE NICHOLAS MARIAN's telephone number to purchase cocaine. CI #21 and Defendant JAMES FORBES left Grand Rapids, Michigan, and travelled to Florida. Defendant JAMES FORBES and CI #21 called Defendant

> GEORGE NICHOLAS MARIAN and met him in Brevard County, Florida, and obtained one kilogram of cocaine. Defendant JAMES FORBES then placed the cocaine in the vehicle, he and CI #21 used a portion of it, and returned the rest of the cocaine to Grand Rapids, Michigan.

Recognizing that the overt acts charged amounted to the very same conduct for which Petitioner was sentenced and punished in the Michigan District Court, Petitioner filed with the Florida District Court a Motion to Dismiss based on grounds of double jeopardy (multiple punishment). He also filed therewith a Motion to Dismiss based on grounds of immunity, contending that the Florida prosecution violated the use and transactional immunity he had been granted in his Michigan plea agreement. Hearings on these motions were held before Florida District Court Judge Patricia C. Fawsett on January 24, 25, and 29, 1991, and February 5 and 11, 1991.

AUSA Mark Courtade testified that as a result of the Petitioner's December 14, 1989, grand jury testimony in Michigan regarding a marijuana trafficking network, 19 other persons were indicted, most of whom entered into cooperating agreements with the Government. The Petitioner, Courtade testified, could take credit for the cooperation and conviction of James Muth and Mark DeVries, who began cooperating as early as January of 1990. (Transcript of January 24, 25, and 29, 1991, February 5 and 11, 1991, evidentiary hearing (hereinafter "EH"), pp. 83, 94) Some of these cooperating co-defendants, including Mark DeVries and James Muth, later informed the Government of Petitioner's involvement with George Marian and cocaine distribution. (EH, pp. 20-21, 25, 94)

In fact, Mark DeVries and James Muth provided information that linked Petitioner

to George Marian, Jeff Wenrich, and the two cocaine transactions for which Petitioner was later indicted in the instant case. (EH, pp. 25 and 168) The Government then adjusted Petitioner's plea agreement upward from an agreed-upon maximum of 10 years to one of 15 years imprisonment to account for his cocaine involvement. Together, these three witnesses, Muth, DeVries, and Wenrich, accounted for approximately 80 percent of the testimony against Petitioner at his Florida trial.

AUSA Courtade testified that he gave Petitioner both use and transactional immunity, stating for the first time that such immunity was limited to the Western District of Michigan. (EH, p. 51) In the same testimony, however, he stated that "[i]t was my understanding none of the information he imparted to us would be used in any other jurisdiction." (EH, p. 91) He testified that while it was not his

intent to grant immunity in other districts, if the Petitioner continued to cooperate with Florida as well, "[i]t was my hope, from day one, and continues to be today, if he cooperates fully in all cases, other jurisdictions would not charge him." (EH, p. 91)

Florida DEA Agent Douglas Waller testified that in late December of 1989 he was contacted by a customs agent who informed him that one Mark DeVries, an informant, would cooperate to assist in the investigation of George Marian. (EH, pp. 162-164) The agent told Waller that DeVries had been indicted in Grand Rapids, Michigan. (EH, p. 163) Waller then contacted Grand Rapids DEA Agent Scott Herman who then arranged for Waller to interview several cooperating defendants including Mark DeVries and James Muth. (EH, pp. 163-164, 167) Waller testified that he had independently located one

Michael Shanley who provided the name of James Muth, Petitioner's cooperating co-defendant. (EH, pp. 164-166, 183)

In March of 1990, Florida DEA Agent Douglas Waller travelled to Michigan and debriefed Muth and DeVries, whose names had been supplied to the Government in Michigan by Petitioner and indicted there as a result of his testimony. (EH, pp. 167-168) Both Muth and DeVries had signed plea agreements and debriefed to Michigan agents prior to Agent Waller's arrival. These co-defendants again described Petitioner's cocaine involvement to Agent Waller. (EH, p. 169) Michigan DEA Agent Herman attended this debriefing and told Agent Waller following the debriefing that Petitioner had lied when testifying before the Grand Jury in November, 1989, about the extent of his involvement with George Marian. (EH, pp. 169-170, 179) Ultimately, Agent Waller gathered the same information from DeVries

and Muth as Michigan Agent Herman had gathered from them earlier, and later used such information to indict Petitioner in the instant case.

Michigan DEA Agent Scott Herman testified that he first learned of Petitioner's cocaine involvement from Mark DeVries in March, 1990, an individual Petitioner had disclosed in his November, 1989, proffer in Michigan. (EH, p. 116) Herman testified that he used information given by Petitioner in the November, 1989, proffer to obtain arrest warrants and indictments against several persons who later associated Petitioner with George Marian and cocaine distribution. (EH, pp. 128-131) He testified further that he arranged for Florida DEA agents to interview several witnesses who were indicted and cooperating as a result of Petitioner's grand jury testimony. (EH, pp. 165-168)

In an April 4, 1991, Order and Opinion, Judge Fawsett denied Petitioner's Motion to Dismiss based on grounds of double jeopardy finding that under United States v Koonce, 885 F 2d 720, 722 (CA 10, 1989), the multiple punishment issue was not yet ripe for review until Petitioner had actually received some punishment from the Florida District Court. (86a and 87a) Judge Fawsett denied the Motion to Dismiss based on immunity finding that (1) the Florida indictment was brought based on sources independent of Petitioner's proffers, testimony, and information given the authorities in Michigan, and (2) Petitioner was granted transactional immunity only in the Western District of Michigan. (79a and 80a) A jury trial was held before Judge Fawsett from April 9, 1990, through April 15, 1990, and Petitioner was found guilty as charged.

At Petitioner's June 24, 1991,

sentencing, Judge Fawsett revisited the issue of multiple punishment and found that

> [B]ecause the trial judge has a wide discretion to consider factors concerning defendant's past in fashioning a sentence including uncharged criminal activity such as here the cocaine trafficking which was not charged at the time of the sentencing up there, I am going to decline Defendant's motion to apply double jeopardy on the sentencing in this case. (June 24, 1991, sentencing transcript, pp. 6-7)

The Court then found a total offense level of 36, criminal history category IV, and consequent guideline range of 262 to 327 months of imprisonment. The Court then sentenced Petitioner to a 324 month term of imprisonment, followed by five years of supervised release. The Court ordered that this sentence be served concurrently with the sentence imposed by the Michigan District Court on July 16, 1990. (June 24, 1991, sentencing transcript, p. 34)

Petitioner filed a timely appeal with the United States Court of Appeals for the

Eleventh Circuit contending (1) that the Florida prosecution, conviction, and sentence amounted to a second prosecution and punishment for the same offense in violation of the double jeopardy clause, the first time having been a conviction and sentence in the Michigan District Court for operating a CCE and (2) that the Florida prosecution violated the terms of immunity he had been granted as part of his Michigan plea agreement.

On December 2, 1993, the Eleventh Circuit rendered a published decision rejecting altogether Petitioner's claims and affirming his conviction and sentence. United States v Nyhuis, supra. (1a) On December 21, 1993, Petitioner timely filed with the Eleventh Circuit his Suggestion of Rehearing En Banc pursuant to Federal Rule of Appellate Procedure 35(b) and Eleventh Circuit Local Rule 35-6 and 35-11. Pursuant to Local Rule 35-6, a Suggestion

of Rehearing En Banc is treated by that Court as a Petition for Rehearing before the original panel and therefore tolls the 90-day period in which to file with this Court a Petition for Writ of Certiorari. See U.S. Supreme Court Rule 13 and Missouri v Jenkins, 495 U.S. 33; 109 L Ed 2d 31; 110 S Ct 1651 (1990). On February 2, 1994, the Eleventh Circuit rendered a one-page PER CURIAM Order signed by Judge CARNES stating that "[t]he Petition(s) for Rehearing are DENIED...., the Suggestion(s) of Rehearing En Banc are DENIED." (63a)

REASONS FOR GRANTING THE WRIT

A. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS RENDERED A DECISION IN CLEAR CONFLICT WITH DECISIONS OF OTHER FEDERAL CIRCUITS ON THE SAME ISSUE IN FINDING THAT PETITIONER WAS NOT SUBJECTED TO MULTIPLE PUNISHMENT IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE WHEN HE WAS PROSECUTED AND PUNISHED FOR THE VERY SAME CONDUCT WHICH, ALTHOUGH NOT CHARGED IN AN EARLIER PROSECUTION, HAD

BEEN MADE THE SUBJECT OF AND ACCOUNTED FOR IN A PLEA AGREEMENT IN THAT EARLIER PROSECUTION AND USED TO INCREASE PETITIONER'S SENTENCE IN THE EARLIER PROSECUTION BY FOUR YEARS.

This Honorable Court will note that the United States Court of Appeals for the Eleventh Circuit has rendered, in the instant case, a decision in clear conflict with the decisions of other United States Courts of Appeals on the same issue of multiple punishment, and has decided an important question of federal law which has not been, but should be, settled by this Court: Does prosecution and punishment for conduct which, although not charged in an earlier prosecution, had been made the subject of and accounted for in a plea agreement in that earlier prosecution and used to increase the sentence in that earlier prosecution by four years violate the protection afforded by the Double Jeopardy Clause against multiple

punishments for the same offense? The Eleventh Circuit Court's observation in this case that "those Courts of Appeal that have [addressed this question] are in agreement that the Double Jeopardy Clause presents no bar to this practice," (35a) is incorrect. At least two other circuits have recently held to the contrary on the issue as generally framed by the Eleventh Circuit. See United States v Koonce, 945 F 2d 1145 (CA 10, 1991), cert. denied, ___ U.S. ___; 112 S Ct 1695; 118 L Ed 2d 406, and cert. denied, ___ U.S. ___; 112 S Ct 1705; 118 L Ed 2d 413 (1992), and United States v McCormick, 992 F 2d 437 (CA 2, 1993). Other circuits, including some of those cited by the Eleventh Circuit in the instant case, would arguably find a violation of the Double Jeopardy Clause on facts such as those presented in the instant case.

While the Double Jeopardy Clause

protects against multiple punishments for the same offense, North Carolina v Pearce, 395 U.S. 711, 717; 89 S Ct 2072, 2076; 23 L Ed 2d 656 (1969), the Eleventh Circuit framed the issue generally as whether a defendant may be prosecuted and punished for conduct that has already been used to enhance the defendant's sentence for a conviction in an earlier prosecution. 8 F 3d at 738-739. The Court then found the decisions in United States v Mack, 938 F 2d 678 (CA 6, 1991), United States v Troxell, 887 F 2d 830 (CA 7, 1989), United States v Garcia, 919 F 2d 881 (CA 3, 1990), and Sekou v Blackburn, 796 F 2d 108 (CA 5, 1986), to be on point and joined these circuits in holding that the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution. Describing the issue

simply as one of enhancement, the Court found irrelevant that both Petitioner's plea agreement and his sentence were fashioned by considering the conduct in question.

Approximately three months after Petitioner was sentenced by the Florida District Court, the Tenth Circuit held that the Double Jeopardy Clause prohibits the conviction and sentence for possession of a controlled substance where the same possession was used in a prior proceeding to increase the defendant's sentence under the United States Sentencing Guidelines. In United States v Koonce, 945 F 2d 1145, a South Dakota jury found Koonce guilty of distributing 443 grams of methamphetamine he had mailed to a Sioux Falls post office box. At sentencing, the Court took into account two additional quantities of methamphetamine (1) 963 grams discovered in Koonce's home upon his arrest following a

search and (2) 6,463 grams purchased from Koonce by a cooperating witness. Thus, Koonce's South Dakota sentence was based upon his distributing a total of 7,869 grams. The Court calculated his initial offense level under the U.S. Sentencing Guidelines as 34 by considering all of the aforementioned amounts of methamphetamine. After adjustments for criminal history and an enhancement for possessing firearms during the commission of the offense, the Court found the appropriate sentence range under the guidelines as 235 to 293 months. The Court sentenced Koonce to 240 months imprisonment, the statutory maximum. The Eighth Circuit Court of Appeals affirmed Koonce's conviction and sentence. United States v Koonce, 884 F 2d 349 (CA 8, 1989) (Koonce I).

Koonce was subsequently charged in a Utah District Court for possession with intent to distribute the aforementioned 963

grams of methamphetamine found in his home. Koonce immediately argued that this prosecution violated the Double Jeopardy Clause. The Court refused to dismiss the indictment however and the Eighth Circuit affirmed, United States v Koonce, 885 F 2d 720, (1989) (Koonce II), rejecting Koonce's multiple prosecution claim because he had not been charged in South Dakota for any crime stemming from the 963 grams, and refusing to rule on his multiple punishment claim because the same was not yet ripe for review. On remand, Koonce was found guilty on the possession charge and the Court sentenced him to 97 months on the methamphetamine count to be served concurrent with his South Dakota sentence. The Utah District Court again dismissed Koonce's Double Jeopardy claim at sentencing and Koonce appealed.

The Tenth Circuit employed a three-step analysis to decide that Koonce's

methamphetamine distribution sentence violated the punishment component of the Double Jeopardy Clause: (1) whether Koonce was punished in South Dakota for the methamphetamine found in his home, (2) whether Congress intended that an accused in Koonce's position should receive cumulative sentences from two separate proceedings where both sentences punished the accused for the exact same conduct, and (3) whether the punishment imposed by the Utah Court constituted double punishment under the Double Jeopardy Clause where the sentence imposed ran concurrently with the South Dakota sentence.

The Court first found that when the South Dakota Court factored the 963 grams of methamphetamine into its calculation of Koonce's initial offense level as required under the guidelines, the Court was punishing Koonce for the same conduct of which he was subsequently convicted and

sentenced in the Utah District Court. The Court then remarked that the punishment component of the Double Jeopardy Clause is driven by legislative intent and that if Congress intended multiple punishment for a single act then the combined punishment would simply be viewed as the appropriate punishment determined by Congress to represent the gravity of the offense and would be upheld, citing to Garrett v United States, 471 U.S. 773, 779; 105 S Ct 2407, 2411; 85 L Ed 2d 764 (1985). The Court then stated that absent evidence to the contrary, it is assumed that "Congress ordinarily does not intend to punish the same offense under two different statutes," Ball v United States, 470 U.S. 856, 861; 105 S Ct 1668, 1671; 84 L Ed 2d 740 (1985), and that there was no evidence that Congress intended that one who distributes a controlled substance should receive punishment both from an increase in the

offense level under the guidelines in one proceeding and from a conviction and sentence based on the same conduct in a separate proceeding. The Court found that under the guidelines, Congress intended for quantities of illicit drugs to be aggregated into one punishment, rather than broken down into separate offenses and punished separately. The Court noted that had Koonce been charged in the South Dakota Court with two separate counts - one based upon the methamphetamine mailed to Sioux Falls and one based upon that found in his home - he would have received a sentence identical to the one that was imposed in the South Dakota prosecution based upon the single count of mailing methamphetamine to Sioux Falls because of the "grouping" of certain offense conduct required by the guidelines. The Court then stated

> It is difficult to believe that Congress would have intended the punishment to be larger if the

> government chose to proceed with two different proceedings (counting the Monticello drugs in both proceedings - once for purposes of sentencing enhancement and once for purposes of punishment for the second conviction) than if it chose to consolidate all of the counts in one proceedings. The protections against prosecutorial charge manipulation strongly suggests that Congress did not intend such a result.

945 F 2d, at 1152. The Court in Koonce then found the decisions in Mack, supra, United States v Williams, 935 F 2d 1531 (CA 8, 1991), and Garcia, supra, (cases cited by the Eleventh Circuit Court in the instant case in support of its holding), distinguishable, observing that these cases did not involve punishment for conduct that was previously aggregated into a defendant's base offense level for a related crime.

Finally, the Court found that under Ball, supra, the sentence imposed by the Utah Court violated the Double Jeopardy Clause despite the fact that it ran

concurrently with Koonce's South Dakota sentence.

The Second Circuit in McCormick, supra, cited Koonce, 945 F 2d, supra, with approval and employed the same three-step analysis to find that prosecution of a defendant for fraud that had already been used to determine his guideline offense level in a prior prosecution violated the protection against multiple punishments. McCormick was charged in Connecticut with bank fraud in a 31-count indictment. The loss from these crimes approximated $75,000.00. A few months later he was charged in a Vermont Court with bank fraud and mail fraud in a 41-count superseding indictment. The losses resulting from these crimes exceeded four million dollars. McCormick was convicted by jury in the Connecticut indictment on all counts. At sentencing, the government referred to McCormick's conduct in Vermont to argue

that the loss arising from his crimes approximated a two and one-half to five million dollar range calling for an increase in his base offense level. The government maintained at sentencing that a sentence based in part on the Vermont conduct would preclude further prosecution on the Vermont charges. The sentencing court accepted the government's argument, increased McCormick's offense level, and sentenced him to the top of his guideline sentencing range.

Subsequently, the Vermont Court found that further prosecution there was barred by the Double Jeopardy Clause but only on those counts that were used by the Connecticut Court in raising the offense level. McCormick appealed, arguing that all counts should be covered by the Double Jeopardy Clause.

The Court in McCormick had little difficulty finding that McCormick was

"punished" for the Vermont conduct taken into account by the Connecticut Court when it determined the amount of loss for which McCormick was responsible. The Court also joined the Koonce Court's conclusion that Congress did not intend to allow additional punishment for conduct that was used to enhance a defendant's offense level and mentioned that the policy of grouping similar harms established in the guidelines also served to minimize the risk of prosecutorial manipulation of counts charged in an indictment.

The Court in McCormick stated in a footnote that the government's statements at sentencing that Vermont would not be likely to pursue charges lended support to the decision to dismiss those counts, finding that the Connecticut Court may have sentenced McCormick with the understanding that McCormick would face no other punishment for that conduct. Finally, the

Court agreed that the availability of concurrent sentences did not eliminate the double jeopardy concerns. The Court emphasized that its holding should not be read as undermining the historic authorization of a sentencing judge to consider all of the aggravating and mitigating circumstances involved in the crime, citing to Williams v Oklahoma, 358 U.S. 576, 585; 79 S Ct 421, 427; 3 L Ed 2d 516 (1959). The Court distinguished other cases such Mack, supra, on the basis of congressional intent, finding that Congress intended to consolidate the punishment for certain conduct when it created the guidelines scheme that allows for changes to a defendant's offense level based on related acts.

The Eleventh Circuit's holding in the instant case cannot be reconciled with that of McCormick. To the extent that the cases relied upon by the Eleventh Circuit, i.e.,

Mack, supra, Garcia, supra, Troxell, supra, and Sekou, supra, are indistinguishable, Petitioner submits that the holdings in these cases are simply at odds with the intent of Congress and with the protection afforded by the Double Jeopardy Clause against multiple punishments. Petitioner is mindful that his Michigan conviction and sentence occurred prior to the effective date of the U.S. Sentencing Guidelines, however, the Court's "congressional intent" analysis in Koonce and McCormick should apply and preclude the punishment imposed by the Florida District Court. Moreover, the facts underlying the increased punishment in the Michigan Court, including the intent of the parties and the Michigan Court, strongly favor a finding of multiple punishment of the kind prohibited by the Double Jeopardy Clause.

There is no doubt that Petitioner was punished in Florida for the same conduct

that added four years to his sentence in Michigan. Further, unlike the conduct resulting in enhanced punishment in Mack, supra, and Garcia, supra, Petitioner's cocaine involvement would, if subject to the U.S. Sentencing Guidelines, have been grouped together with the marijuana amounts to calculate a base offense level.

The instant case more closely resembles the circumstances in McCormick, supra, to the extent that the government there made representations that further prosecution would not ensue. In the instant case, the plea agreement included the government's agreement not to bring additional criminal charges against Petitioner arising out of those transactions already disclosed to the government by Petitioner. Prior to the May 25, 1990, plea hearing, Petitioner had divulged on April 6, 1990, information regarding his cocaine involvement in a debriefing. Moreover, at that same plea

hearing, the government stated that "if the Court accepts the ultimate agreement of the parties the Defendant is fully protected." (Emphasis added) Petitioner's cocaine involvement was made the subject of, and accounted for in, his plea agreement and conviction in Michigan, and it was the intent of all parties involved, including the Court, that Petitioner would be protected from further prosecution for his cocaine involvement. At Petitioner's July 16, 1990, sentencing in the Michigan Court, the government in fact labeled the negotiated increase in sentence as a "sentence."

In United States v Halper, 490 U.S. 435, 451, n. 10; 104 L Ed 2d 487; 109 S Ct 1982 (1989), the Court said

> On the other hand, when the government has already imposed a criminal penalty and seeks to impose additional punishment in the second proceeding, the Double Jeopardy Clause protects against the possibility that the government is

> seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.

Inasmuch as the conduct charged in Florida was no more than what was disclosed and accounted for in Michigan, the Florida prosecution represents such a case.

Equally important to this analysis is the question of whether the Florida Court's sentence upsets Petitioner's legitimate "expectation of finality in the original sentence," i.e., sentence imposed by the Michigan District Court. United States v DiFrancesco, 449 U.S. 117, 139; 66 L Ed 2d 328; 101 S Ct 426 (1980). In United States v Fogel, 829 F 2d 77 (DC Cir., 1987), Judge Bork, writing for the Court, stated that the

> application of the Double Jeopardy Clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is

> prohibited by the Double Jeopardy Clause. If, however, there is some circumstance which undermines the legitimacy of that expectation, then a Court may permissibly increase the sentence. (At p. 87)

Judge Bork observed that one of the interests protected by constitutional finality is that of the defendant to be free from being compelled to live in a continued state of anxiety and insecurity. Green v United States, 355 U.S. 184, 187; 78 S Ct 221, 223; 2 L Ed 2d 199 (1957). If the Florida Court, under the circumstances presented in the instant case, can punish Petitioner again for the same conduct which was accounted for in the earlier conviction and sentence, then the interest in protecting a defendant from being compelled to live in a continued state of anxiety is lost. Any other holding would place form above substance and would be inconsistent with the proper focus of the prohibition against double jeopardy.

The Eleventh Circuit, relying again on Mack, Troxell, Garcia, and Sekou, supra, found the increased punishment in the Michigan Court indistinguishable from an enhanced sentence based on a prior conviction. These two forms of increased punishment, however, are not indistinguishable. The Eleventh Circuit stated in United States v Pleasant, 730 F 2d 657, 662 (CA 11), cert. denied, 469 U.S. 869; 105 S Ct 216; 83 L Ed 2d 146 (1984):

> ....In other words, the underlying offense becomes a greater crime, worthy of greater punishment, when a recidivist commits it. [The dangerous special offender statute], then, gives the sentencing judge more latitude accurately to reflect in his sentence the higher risk to society involved in the crime when a recidivist commits it, and the according enhanced need for a specific deterrence of the offender, general deterrence of like offenders, and retribution for the crime.

See also Gryger v Burke, 334 U.S. 728, 732; 68 S Ct 1256, 1258; 92 L Ed 2d 1683 (1948) (habitual offender sentence "is a stiffened

penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."

Prior convictions then, are considered because they reflect that the defendant is unwilling to rehabilitate himself; that he had an opportunity to reform but did not. Both the defendants in Troxell and Mack, supra, committed the conduct resulting in an enhanced sentence following their conviction on the charged offense and thus, Mack and Troxell are distinguishable in this respect, although the Court in those cases did not employ such reasoning.[9]

In Troxell, supra, the enhanced punishment arising out of the defendant's failure to appear for sentencing was

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[9] This Court will note that the Court in Mack, supra, also relied on Koonce II, 885 F 2d 720, in which the Court addressed an issue of multiple prosecution and later held contrary to Mack on the issue of multiple punishment in Koonce III, 945 F 2d 1145.

directed at the "overall unwillingness to be rehabilitated" demonstrated by the defendant in failing to appear for sentencing. The defendant there was given an opportunity to reform and failed to do so. The Court also remarked that "[m]ere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act." 887 F 2d at 836. In the instant however, the Michigan Court attached more than "some minimal significance" to Petitioner's cocaine involvement and the punishment was imposed specifically for that conduct rather than a failure to reform after an opportunity to do so.

Garcia, supra, is also similarly distinguishable, and the Court's analysis in Garcia actually supports a finding of a double jeopardy violation in the instant case. The Court in Garcia found that it was the defendant's concealment of certain

drug offenses rather than the drug offenses themselves that resulted in a heavier sentence and thus the defendant was not already "punished" for those offenses. The Court was clearly of the opinion that should the defendant demonstrate that the Court imposing the original sentence used such information for the obvious purpose of imposing punishment for the unadjudicated conduct the defendant would have presented a *prima facia* case of a double jeopardy violation. 919 F 2d at 887. Undoubtedly, the Garcia Court would not be likely to hold that circumstances such as those presented in Petitioner's case never pose double jeopardy concerns, rather, only that a *prima facia* case of a double jeopardy violation would require more than merely showing that the presentence report in the first prosecution made reference to the unadjudicated criminal conduct.

Petitioner does not contest that a

sentencing court is entitled to consider all relevant information concerning all aspects of the defendant's life when fashioning a sentence, including prior criminal conduct for which the defendant has not been convicted, other misconduct and anti-social behavior. However, in the instant case, the very plea agreement and sentence were fashioned with an intent to incorporate Petitioner's cocaine involvement, include punishment for that very conduct, and to make unnecessary any additional prosecution. Certainly the plea agreement and the representations made by the parties would have prompted the sentencing judge to conclude that Petitioner would face no further prosecution for his cocaine involvement. Petitioner was as much as "prosecuted," convicted, and sentenced for his cocaine involvement in the Michigan Court as he was in the Florida Court. Petitioner was

sentenced in the Michigan Court specifically for his cocaine involvement, not for concealment of his involvement or for an unwillingness to reform after conviction and an opportunity to do so. His cocaine involvement was not treated or considered by the Michigan Court merely in the same manner as other misconduct is traditionally considered at sentencing. Circumstances leading to the Michigan Court's enhanced sentence are of the type the Garcia Court would undoubtedly find violative of the Double Jeopardy Clause.

Petitioner respectfully submits that this case supplies the Court with the opportunity to address this issue in a recurring factual setting, and that a definitive pronouncement on the propriety of the Florida Court's sentence will resolve conflicting opinions between the federal circuits and will be of jurisprudential significance. We therefore

respectfully request that this Court grant certiorari.

B. PETITIONER HAS BEEN PROSECUTED AND PUNISHED IN VIOLATION OF THE USE AND TRANSACTIONAL IMMUNITY GRANTED TO HIM BY THE GOVERNMENT IN THE EARLIER MICHIGAN PROSECUTION.

Petitioner submits that the Eleventh Circuit has failed to follow the guidelines and dictates this Court has set forth in Kastigar v United States, 406 U.S. 441; 32 L Ed 2d 212; 92 S Ct 1653 (1972), and Santabello v New York, 404 U.S. 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), for defining and interpreting the scope of immunity within the context of a plea agreement, and that an exercise of this Court's power of supervision is necessary to enforce immunity granted the Petitioner in an earlier prosecution.

Petitioner submits that the District Court erroneously concluded that the Government carried its burden of showing

under Kastigar, supra, that the evidence it used to indict, prosecute, and punish Petitioner was derived from a source "wholly independent" of Petitioner's proffer, Grand Jury testimony, and other information given the authorities in the Western District of Michigan. The lower courts have simply refused to recognize the link between Petitioner's November, 1989, Grand Jury testimony and the majority of the evidence that led to his indictment and conviction in the instant case. It is undisputed that the Petitioner debriefed to the Government or its agents in November of 1989 and, while Petitioner did not divulge at that time any of his cocaine involvement, he did supply to the Government the names of Mark DeVries and James Muth, both of whom were involved in the distribution of marijuana and cocaine. Upon learning that Petitioner had implicated them, Muth and DeVries, as early

as January of 1990, decided to cooperate with the Government. Even assuming Florida DEA Agent Waller first learned of Mark DeVries through a custom's agent unrelated to the Michigan investigation, and learned the name of James Muth through an independent source, he obtained testimony from them in March of 1990 regarding Petitioner's cocaine involvement only because Petitioner's earlier proffer or Grand Jury testimony prompted these individuals to cooperate with the Government both in Michigan and in Florida. Further, at the time Florida DEA Agent Waller debriefed DeVries and Muth, Michigan DEA Agent Herman shared some of the substance of Petitioner's earlier Grand Jury testimony by informing Waller that the Petitioner had lied when testifying before the Grand Jury in November of 1989 about the extent of his involvement with George Marian.

In Kastigar, supra, this Court stated that the

> statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom....

406 U.S. at 460. This Court in Kastigar made clear that the immunity granted must leave the witness in substantially the same position as if the witness had claimed the Fifth Amendment privilege, because such immunity is co-extensive with the privilege and suffices to supplant it. This Court also stated that the Government's burden was a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources," and that the witness must be protected from future prosecution based on knowledge and sources of information obtained from the compelled testimony. 406 U.S. at 454, 461-462. Had Petitioner claimed the Fifth Amendment privilege in the instant case,

DeVries and Muth would not have been sources of information from which to gather evidence to convict the Petitioner in the instant case. The Government should not be allowed to avoid the "sweeping proscription" of such immunity merely by demonstrating that Muth and DeVries were located independently when these individuals testified against the Petitioner only as a direct result of Petitioner's earlier Grand Jury testimony or proffer. Finally, Kastigar and its progeny require dismissal of an indictment of a previously immunized witness unless the Government can demonstrate that none of the evidence presented to the Grand Jury is derived, directly or indirectly, from the immunized testimony. See United States v Hampton, 775 F 2d 1479, 1489 (CA 11, 1985).

In determining the scope of transactional immunity granted under the terms of the plea agreement in the instant

case, the Eleventh Circuit found that "the terms of the agreement unambiguously precluded the Government only from (1) bringing additional criminal charges against the Petitioner in the Western District of Michigan arising out of his involvement in the distribution of marijuana, and (2) bringing additional charges against the Petitioner arising out of those transactions disclosed by the defendant in the proffer already made to the Government. 8 F 3rd, at 742. The Court reasoned that the second prong or promise aforementioned had not been violated by the Government because at the time the plea agreement was "executed" Petitioner's proffer to the Government did not include any mention of his cocaine involvement or George Marian; thus, the Government did not breach its agreement not to charge Petitioner for any conduct arising out of "those transactions

disclosed by the defendant in the proffer already made to the Government." (48a and 49a)

Petitioner submits that if the interpretation of plea agreements is an art informed by contract law principles (see United States v Garcia, 954 F 2d 12, 17 (CA 1, 1992), the Eleventh Circuit's analysis is plainly flawed. The Eleventh Circuit's opinion presupposes that the plea bargain or agreement was "executed" on December 13, 1989, or prior to the Petitioner's disclosure of his cocaine involvement. However,

> [a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied and the judgment of a court, does not deprive an accused.... [(Emphasis added)]

Mabry v Johnson, 467 U.S. 504, 507; 81 L Ed 2d 437; 104 S Ct 2543 (1989). The plea agreement in the instant case was re-affirmed in a May 24, 1990, stipulation,

reaffirmed on the record before the Michigan Court on May 25, 1990, and again at Petitioner's July 16, 1990, Michigan sentencing when the Government assured the Court that if the Court accepted the plea agreement the Petitioner would be "fully protected." Thus, Petitioner's plea agreement was "executed" at least as late as May 25, 1990, or July 16, 1990, when the Michigan District Court accepted Petitioner's guilty plea and Petitioner was thereby convicted. Proffers already made to the Government prior to May 25, 1990, would include therefore Petitioner's April, 1990, debriefing when he fully disclosed his cocaine involvement and activities with George Marian.

Neither can it be said that the Government was unaware of Petitioner's cocaine involvement before any opportunity to lawfully withdraw its bargain. Neither the Government nor the defendant is bound

by the plea agreement until it is approved by the Court. See United States v Savage, 978 F 2d 1136 (CA 9, 1992), United States v McGovern, 822 F 2d 739 (CA 8), cert. denied, 484 U.S. 956; 108 S Ct 352; 98 L Ed 2d 377 (1987). In the instant case, it was the Government's very intention that "those transactions disclosed by the defendant in the proffer already made to the Government" include the Petitioner's April, 1990, disclosure of his cocaine involvement, despite Petitioner's earlier non-disclosure. Petitioner's proffer did therefore include his cocaine involvement at the time the plea agreement was executed. At a minimum, the agreement is deficient or ambiguous for the Government's failure to designate which proffers were to be considered when defining the scope of immunity, and the provision should be read against the Government. Constitutional concerns would undoubtedly require holding

the Government to a greater degree of responsibility than the defendant for imprecisions or ambiguities in the plea agreement. See United States v Harvey, 791 FLd 294 (CA 4, 1986).

This Court has held that when a guilty plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v New York, 404 U.S. at 262; 30 L Ed 2d at 433. The Eleventh Circuit has recently held that whether the Government violated the agreement is judged according to the defendant's reasonable understanding at the time he entered the plea. United States v Boatner, 966 F 2d 1575, 1578 (CA 11, 1992). If it was the Government's intention that "none of the information [Petitioner] imparted to us would be used in any other jurisdiction," and that if Petitioner

cooperated "other jurisdictions would not charge him," (January 24, 1991, EH, p. 91) clearly it was reasonable of Petitioner to understand based upon his plea agreement that he would not be charged in any other jurisdiction since he had fully divulged his cocaine involvement.[10] Indeed, it is hard to imagine that Petitioner would agree, in the Michigan prosecution, to cooperate in the Florida investigation, i.e., provide evidence that would incriminate himself, without an understanding that he would be immune from prosecution in Florida for at least the cocaine involvement he had already disclosed to the Government. Petitioner should be "fully protected" as the

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[10] It has also been held that United States Attorneys are bound by one another's plea agreements unless the agreement expressly provides otherwise. United States v Carter, 454 F 2d 426 (CA 4, 1972) (en banc), cert. denied, 417 U.S. 933; 94 S Ct 2646; 41 L Ed 2d 237 (1974).

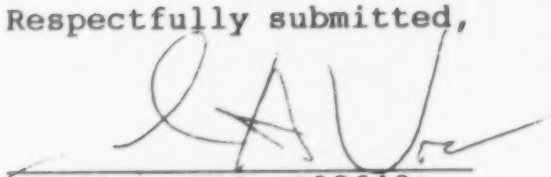
Government promised at the May 25, 1990, Michigan plea proceeding.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court grant certiorari and issue a definitive pronouncement on the propriety of the multiple punishment in the instant case in order to resolve any conflicting opinions between the Federal Courts as well as to clarify an issue of jurisprudential significance. Petitioner respectfully prays that this Court grant plenary review, reverse the decision of the United States Court of Appeals for the Eleventh Circuit, hold that the Florida District Court's sentence in the instant case was violative of the Petitioner's Fifth Amendment protection against double jeopardy; and that this Court find as well that prosecution in this case violated immunity granted by the Government in the earlier Michigan prosecution. Petitioner prays,

therefore, that this Honorable Court vacate the judgment of the Florida District Court.

April 29, 1994 Respectfully submitted,



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